Supreme Court, U.S.
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No. 10-735

In the

Supreme Court of the United States

PHILIP MORRIS USA, INC., *et al.*,

Petitioners,

v.

DEANIA M. JACKSON, on behalf of herself and all other persons similarly situated,

Respondent.

On Petition for a Writ of Certiorari to the Louisiana Fourth Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause prevents state courts from employing the class action device to eliminate fundamental substantive and procedural protections that would otherwise apply to adjudications of class members' individual claims.

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INTEREST OF AMICUS CURIAE

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project is concerned with class action abuse and its adverse impact on the free market and entrepreneurial activities of America's job-creators and employers. To that end, PLF has participated as amicus curiae in many important cases involving misuse of class certification, including *Dukes v. Wal-Mart*, United States Supreme Court, docket no. 10-277 (pending); *Garcia v. Medved Chevrolet, et al.*, Colorado Supreme Court, docket no. 09SC1080 (pending); *Barber v. American Airlines*, Illinois Supreme Court, docket no. 110092 (pending); and *Grayson v. AT&T*, D.C. Ct. App., docket no. 07-CV-1264 (pending).[1]

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

States traditionally have considerable leeway in the rules they apply to class actions in their own state courts, but sometimes these procedures cross the line to violate the United States Constitution's due process guarantee. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (Class actions may "achieve economies of time, effort, and expense," but only when those goals can be achieved "without sacrificing procedural fairness or bringing about other undesirable results."); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (The "Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members." (emphasis added)); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.").

This is such a case, and the issues presented are not an aberration. Plaintiffs in many jurisdictions are asking courts to strip defendants of the right to defend themselves, by simply "presuming" the existence of crucial elements of the plaintiffs' claims. Some seek an extension of the fraud-on-the-market doctrine announced in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Others simply appeal to a court's interest in efficient allocation of judicial resources. Most courts have thus far resisted, leaving the decision below an outlier in conflict with many circuit courts and state courts of last resort. If the decision below is permitted to stand, however, it could portend a barrage of new, lightly tethered class actions held together only on the

basis of presumptions. Class actions were intended to allow aggregation of substantially similar claims, not to allow deeply flawed claims to hide their individual deficiencies by mass presentation.

"The benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). For these reasons, the Petition should be granted.

ARGUMENT

I

THE DUE PROCESS REQUIREMENTS OF CLASS CERTIFICATION PRESENT A SIGNIFICANT NATIONWIDE ISSUE THAT CAN BE RESOLVED ONLY BY THIS COURT

Clearly class action litigation creates certain efficiencies; these efficiencies, however, cannot be employed at the cost of denying individual litigants justice in the courts. *Stone v. White*, 301 U.S. 532, 535 (1937) (where a plaintiff has a right to make an equitable claim, the defendant has an equal right to present a case to defeat that claim); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc) ("[C]onsiderations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice."), *cert. denied*, 464 U.S. 1040 (1984); *see also* James A. Henderson, Jr., *Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329, 329 (2005) ("[W]hile class actions sacrifice individual autonomy in collective claiming processes to achieve consistent outcomes and economies of scale, the

underlying claims remain individual in nature.").[2] Aggregating claims in a class action should not dramatically alter the substantive law underlying the lawsuit. *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 318 (5th Cir. 1978) ("Just as the meaning of liability does not vary because a trial is bifurcated, the requisite proof also in no way hinges upon whether or not the action is brought on behalf of a class under Rule 23. . . . Consequently, this court has no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs."); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66 (4th Cir. 1977) ("Generalized or class-wide proof of damages in a private anti-trust action would, in addition, contravene the mandate of the Rules Enabling Act that the Rules of Civil Procedure 'shall not abridge, enlarge or modify any substantive right.'") (footnote omitted).

Allowing plaintiffs to presume an essential element in their claim creates a procedure unfairly benefitting plaintiffs at the expense of defendants. *See, e.g., In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (plaintiffs' proposal to prove causation through individual affidavits submitted to special

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[2] Procedural fairness is required for individual justice for two reasons. First, fair process is often celebrated as an end in itself. *See, e.g.*, Judith Resnik, *et al.*, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296, 306 (1996). Underlying this view is the notion that every American has a right to his "own day in court." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4449 (1981)). Second, procedural fairness also implicates the results of litigation; in other words, the fairness of process can depend on the fairness of the outcomes it produces. *See, e.g.*, Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 201-02 (1992).

master rejected as "one-sided procedure [which] would amount to an end-run around defendant's right to cross-examine individual plaintiffs"). Even when there is a common question as to the wrongfulness of the defendant's conduct, "this is only half the question"; courts may not combine claims in a class action where there are individualized facts as to whether each class member suffered actual damages. *Yeger v. E*Trade Sec. LLC*, 65 A.D.3d 410, 884 N.Y.S.2d 21, 24 (N.Y. App. Div. 2009) (footnote omitted). "The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member.").

The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. at 66. By removing individual considerations from the adversarial process, the judicial system is shorn of a valuable method for screening out marginal and unfounded claims. In this way, "[c]lass certification magnifies and strengthens the number of unmeritorious claims." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); *see also* John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 Cornell L. Rev. 990, 1010-11 (1995); Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 Cornell L. Rev.

1022, 1023-24 (1995) (both observing that mass tort cases have a tendency to attract many unmeritorious claims). "If claims are not subject to some level of individual attention, defendants are more likely to be held liable to claimants to whom they caused no harm." *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 438 (Tex. 2000).

One of the reasons for the individualized showings of causation, reliance, and injury is that class actions tend to attract substantial numbers of "parasitic" plaintiffs whose claims would be worthless were it not for the existence of the class. *See Thorogood v. Sears Roebuck & Co.*, 2010 U.S. App. LEXIS 24641, *13-*17 (7th Cir. Dec. 2, 2010) (on denial of rehearing en banc, citing considerable literature detailing the potential and actual abuses of the class action procedure); Rhetoric of Crisis, *supra*, at 994. Class treatment can hide the weaknesses in the claims of individual plaintiffs because the plaintiffs collectively are "able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998).

To guard against these potential problems, commonality in class action litigation must be genuine and not superficial. General allegations do not satisfy the commonality requirements when the actual facts of the case reflect that legal and evidentiary issues are not constant, but vary among class members. *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996) (evidence that putative class members would have acted in a particular manner is a "highly individualized" issue that defeats commonality). John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 Ind. L.J. 625, 652-54 (1987) (commonality among

plaintiff class members is important because class members with stronger than average claims may not be proportionately compensated, and the weaknesses in other class members' claims may work to the disadvantage of the class as a whole). Common questions such as, "Did the defendant defraud each member of the class?" can be manufactured in almost any case and are of little analytical value. Markham R. Leventhal, *Class Actions: Fundamentals of Certification Analysis*, 72 Fla. B.J. 10, 12 (1998).

Thus, most courts require a showing of individual reliance in consumer class actions. *See, e.g., Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 234-36 (Md. 2000) (reasoning that because class members with claims under state's consumer protection act would have to individually prove reliance on defendant's alleged misrepresentations and material omissions, class certification was inappropriate); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 694 (Tex. 2002) (refusing to adopt class-wide presumption of reliance on misrepresentations made by defendant where it found "no evidence that purchasers actually did rely on [defendant's] statements so uniformly that common issues of reliance predominate over individual issues"); *Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 975 (5th Cir. 2000) (As a general rule, "[c]ertification is improper if the merits of the claim [depend] on the defendant's individual dealings with each plaintiff."); *Hammett v. Am. Bankers Ins. Co. of Florida*, 203 F.R.D. 690, 699 (S.D. Fla. 2001) (whether the defendants delayed or improperly paid each class members' claims could not be determined only by considering the legality of the defendants' actions, but required consideration of each class member's cardholder agreement and claims history, because "these and other variables will affect

whether a class member has a cognizable injury"); *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1138 (Fla. Ct. App. 2008), *rev. denied*, 999 So. 2d 644 (Fla. 2008) ("[T]o proceed at the level of abstraction urged by [plaintiff] would raise due process concerns."). The public does not benefit from having individual consumer protection or tort claims weakened through improper class certification decisions.

II

COURTS NATIONWIDE ARE BEING ASKED TO "PRESUME" RELIANCE, INJURY, AND DAMAGE TO ALLOW CERTIFICATION THAT OTHERWISE WOULD BE DENIED FOR LACK OF PREDOMINANT COMMON ISSUES

In contrast with the decision below, most courts are properly disinclined to allow the class action procedure to override the need for individualized showings of reliance and injury,[3] placing the decision

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[3] *See, e.g., Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1092 (1993) (presumption of reliance cannot be applied to common law deceit and negligent misrepresentation claims in a securities class action); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 474-75 (Del. 1992) (refusing to apply fraud-on-the-market presumption theory to state law class action fraud claims); *White v. BDO Seidman, LLP*, 249 Ga. Ct. App. 668, 671-72 (2001) (presumption of reliance inapplicable to negligent misrepresentation class action claim); *Kaufman v. i-Stat Corp.*, 165 N.J. 94, 109, 111 (2000) (no presumption of reliance to negligent misrepresentation class action claim); *Securities Investor Prot. Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 73 (2d Cir. 2000) (holding fraud-on-the-market, "[t]o the extent that the federal courts have adopted this concept . . . has applied only in the context of the federal securities law"(citing *Arthur Young & Co. v. United States District Court*, 549 F.2d 686, 695 (9th Cir. 1977)); *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1337 (S.D. Fla. 2007); *Heindel v. Pfizer, Inc.*, 381 F.

(continued...)

below in conflict with the many cases identified in the Petition. The ripple effects of this case, therefore, will be strong and immediately felt if this Court does not review the decision below, particularly in light of the opinion accompanying the stay of proceedings, which would be perceived as being rejected. Creative class action counsel are continually looking for ways to "presume" elements of the plaintiffs' claims, so as to win the crucial first battle of certification.

For example, the Colorado Supreme Court currently is considering the case of *Garcia v. Medved Chevrolet* (docket no. 09SC1080), in which Trina Garcia, purporting to represent thousands of automobile purchasers, seeks to employ the fraud-on-the-market doctrine in the consumer protection context, so as to avoid having to prove any reliance on the alleged misrepresentations or any injury resulting from that reliance. Specifically, she alleges that the defendant automobile dealerships' addition of aftermarket products (such as pinstripes) to new vehicles violates the Colorado Consumer Protection Act when the documentation accompanying the sale does not break out the cost of those extra aftermarket products. Garcia purports to represent a class of all purchasers between 2003 through 2009, based on a presumption that each class member was injured by alleged misrepresentations in the common paperwork that accompanied each sale. *Garcia v. Medved Chevrolet, Inc.*, No. 09CA1465, 2009 Colo. App. LEXIS 1882, at *20 (Colo. Ct. App. Nov. 12, 2009).

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[3] (...continued)
Supp. 2d 364, 380 (D.N.J. 2004); *Mishkin v. Peat, Marwick, Mitchell & Co.*, 658 F. Supp. 271, 274-75 (S.D.N.Y. 1987).

The trial court certified two classes: purchasers who were charged for products that were never installed, and purchasers for whom products were installed but allegedly not adequately disclosed. The court of appeals, rejecting the fraud-on-the-market theory for consumer protection claims, reversed, holding that Garcia did not have a method to prove that each supposed member of the class was caused actual injury. *Id.* at *27-*28. The Colorado Supreme Court granted review of the case, specifically to decide whether "consumers in Colorado [can] pursue class actions under the Colorado Consumer Protection Act ("CCPA"), or do potential differences in each individual sale on the issue of ***reliance*** prevent class certification for lack of predominant issues of law or fact?" *Garcia v. Medved Chevrolet, Inc.*, Petition for Writ of Certiorari at 1 (filed Dec. 28, 2009).

Meanwhile, in New York, consumer-plaintiffs complained that they had overpaid for allegedly deceptively labeled "All Natural" Snapple containing the much maligned high fructose corn syrup, and sought class certification based on a presumption that the purported class members had relied on the label and been injured. *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742, 2010 U.S. Dist. LEXIS 79647 (S.D.N.Y. Aug. 3, 2010). The district court denied the motion to certify the class on the grounds that common issues did not predominate. *Id.* at *16-*17. The court held that the plaintiffs had no ability to prove at trial, through common evidence, that each of the putative class members paid a premium for Snapple beverages as a result of the "All Natural" labeling. *Id.* This proof was made especially difficult because, as is the case in the challenged car sales in *Garcia*, there was no "uniform price for Snapple beverages during the class

period" such that putative class members paid varying prices for the products. *Id.* at *23. The court emphasized that the issue of damages was bound up with the issue of injury and that therefore the plaintiffs failed to show how damages could be proven class wide. *Id.* at *18-*19. The court further rejected class certification on the plaintiffs' unjust enrichment claim, holding that it would require individual inquiries as to whether each class member was fully informed about the inclusion of high fructose corn syrup, whether they understood the syrup to be "natural," and whether they continued to buy Snapple despite their knowledge of the syrup. *Id.* at *35.[4]

The Eighth Circuit was entreated with plaintiffs' request for class certification in *In re St. Jude Medical Inc., Silzone Heart Valve Prods. Liability Litig.*, 522 F.3d 836 (8th Cir. 2008). The plaintiffs in that case had been implanted with heart valves that the manufacturer had recalled due to reports of leakage. The court found that individualized questions as to whether the patients or their doctors had ever been exposed to misrepresentations about the faulty medical device would overwhelm any common issues. *Id.* at 838-39. Even if Minnesota's consumer fraud statute did not require the plaintiffs to present direct evidence of reliance upon misleading statements, the court held that it could not

> prohibit St. Jude from presenting direct evidence that an individual plaintiff (or his or

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[4] *See also Pelman v. McDonald's Corp.*, 2010 U.S. Dist. LEXIS 114247, *30-*31, *38 (S.D.N.Y. Oct. 27, 2010) (decertifying, after eight years of litigation, the class of consumers claiming that McDonald's allegedly misleading advertising caused a laundry list of health problems).

> her physician) did not rely on representations from St. Jude. When such evidence is available, then it is highly relevant and probative on the question whether there is a causal nexus between alleged misrepresentations and any injury.

Id. at 840. The court bolstered its conclusion by noting that the defendants had discovered evidence that many of the named class representatives and their doctors had never been exposed to any misrepresentations about the device. *Id.* at 839. *See also Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664-66 (9th Cir. 2004) (rejecting the plaintiffs' argument that evidence that video poker and electronic slot machines were deceptively advertised as games of chance sufficed as class-wide proof of individual reliance, on the basis that gamblers use such machines for a variety of individualized reasons); *In re TJX Cos. Retail Security Breach Litig.*, 246 F.R.D. 389, 395 (D. Mass. 2008) (where reliance is an element of a claim, a presumption of reliance is never appropriate because "[p]roving the element of reliance will necessarily involve individual questions of fact."); *In re Grand Theft Auto Video Game Consumer Litig. (No. II)*, 251 F.R.D. 139, 155-57 (S.D.N.Y. 2008) (rejecting plaintiffs' argument that evidence of single misrepresentation to entire class in form of video game rating was sufficient to establish that class members relied on rating's representation of game's content in making purchase); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 874 (Fla. Ct. App. 2006) (holding that allowing plaintiff class of 65,000 purchasers of termite control to prove their allegations of deficient performance through "collective proof" would, "[b]y any standard . . . amount to a violation of substantive due process of law").

CONCLUSION

"[T]he Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (extolling the virtues of the Due Process Clause) (footnote omitted). The defendant manufacturers in this case were deprived of their opportunity to defend themselves, while the plaintiffs were permitted to presume essential elements of their claims. This case raises significant due process questions of national importance.

The Petition for Writ of Certiorari should be granted.

DATED: December, 2010.

Respectfully submitted,

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